COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Complaint of MCI WorldCom, Inc. Against New England Telephone and Telegraph Company, d/b/a Bell Atlantic-Massachusetts	)	D.T.E. 97-116
Complaint of Global NAPs, Inc. Against New England Telephone and Telegraph Company, d/b/a Bell Atlantic-Massachusetts	)	D.T.E. 99-39

RNK, INC. D/B/A RNK TELECOM COMMENTS ON VERIZON MASSACHUSETTS' MOTION TO RE-OPEN DOCKETS

I. INTRODUCTION

RNK is a registered Competitive Local Exchange Carrier ("CLEC") in the Commonwealth of Massachusetts offering residential and business telecommunications services via resale and its own facilities. Via its own facilities, RNK serves a variety of customers, including Internet Service Providers ("ISPs"), with a variety of telecommunications and non-telecommunications services.

II. BACKGROUND

RNK, like most CLECs until relatively recently, has operated continuously under "first-generation"[1] interconnection agreements ("ICA") with Verizon pursuant to Section 252 of the

1 For the first couple of years after the passage of the Act, before Verizon conceded in open competition the emerging internet-based customer market, typical ICAs between CLECs and Verizon did not undertake to differentiate ISP-bound traffic from other traffic using local numbers and, accordingly, reciprocal compensation was billed and, initially, collected for such traffic. At all times relevant to the issue at hand, Verizon and RNK have operated under one of such ICAs (first, the so-called "Brooks" agreement until late 2000 at which time RNK opted into another one of

Telecommunications Act of 1996 (the "Act").[2] Under these ICAs, RNK provides a variety of services to its own customers and to Verizon, including terminating Verizon's customers' originating traffic to RNK customers, some of which are ISPs. From the time RNK began providing facilities-based services to Verizon and its customers until February, 1999, RNK received compensation from Verizon for performing these services for Verizon and Verizon's customers. Since the release of 97-116-C, [3] RNK has continued to perform and bill these services in Massachusetts but has received no compensation for doing so. RNK has had a rational expectation that, once the Federal Communications Commission ("FCC") had clarified the nature of, and appropriate intercarrier compensation schemes for, ISP-bound traffic, RNK would eventually be able to recoup full compensation for its work under its Interconnection Agreements from other carriers whose customers originate the ISP-bound calls along with other compensable intercarrier traffic, and some compensation, perhaps at a decreased rate, after those Interconnection Agreements expired and new ones were created.

RNK hoped that the effect of the FCC *Order on Remand*[4] would be two-fold: (1) to potentially end the period of limbo relative to compensation for ISP-bound traffic in Massachusetts,[5]

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such ICAs, the so-called "MCI" agreement).

2 The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151, et seq.).

3 MCI WorldCom Technologies, Inc., D.T.E. 97-116-C (1999) ("97-116-C").

4 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, *Order on Remand and Report and Order* (April 27, 2001) ("*Order on Remand*").

5 In this docket, the DTE stated that:
"the Department will be bound by the determinations made by the FCC on remand, whatever those determinations may be. …[and further] determines that stability during the *interim* by upholding the

and (2) to set out a recommended course of action for states that had not already established some alternate (to such compensation being subject to the reciprocal compensation provisions of the Act) compensation mechanism for such traffic, and/or for carriers who have not already managed to resolve such intercarrier compensation mechanisms through negotiation.[6] Massachusetts is one of those states, and RNK is one of those carriers. Unless the Department facilitates, mediates, or obviates via a new order, the intercarrier negotiations they have repeatedly recommended, or until the Department is superceded by court order, for the finite period until the *FCC Remand Order* went into effect, Verizon has no incentive whatsoever to negotiate on an even playing field, and as such, no truly fair negotiated resolutions have, or will result.

III. ARGUMENT

A. Verizon's Motion is Premature

In today's Comments, RNK states that, as a threshold matter, it is puzzled that Verizon has jumped the gun with its Motion before the U.S. District Court even rules on the Magistrate Judge's recent Findings and Recommendations.[7] There has been no change of law that the Department need, or

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finality of D.T.E. 97-116-C … is the better course."
In "97-116-C," the Department had ruled that ISP-bound traffic was not subject to reciprocal compensation under section 252 of the Act, but stated that it should be subject to some form of compensation to be determined.

6 *See, generally, Order on Remand* at ¶¶ 77-88. RNK tried negotiations with Verizon in good faith, as urged by the Department in DTE 97-116-C, but was unable to come to a reasonable result (see RNK Comments to DTE, August 1999).

7 "GNAPs and WorldCom have sought review of the Department's orders in the United States District Court for the District of Massachusetts (Nos. 2000CV10407-RCL and 2000CV11513-RCL). On July 5, 2002, the Magistrate Judge to whom the district judge referred the case proposed in her non-binding recommendation that the district judge find "that the DTE violated federal law by issuing orders in which it refused to consider whether, pursuant to Massachusetts law and other equitable and legal principles, the parties contracted in their interconnection agreements for reciprocal compensation for calls bound for ISPs." Magistrate Judge's Findings and Recommendations at 27 ("F&R")[.]" Verizon Motion at 3.

need not, as the case may eventually be, address. The essence of Verizon's Motion seems to be somehow to obviate what may, in fact, be an eventual unfavorable ruling by the Court. Futilely, Verizon seems to hope that, should the Department now – presumably – insist again that it did analyze the language of the agreements at issue, or now take any other action – "clarifying" or otherwise -- for that matter, the Court will defer its jurisdiction properly assumed to review any and all actions by the Department. As further expounded below, RNK cannot imagine any new action by the Department at this time that would effectively moot the pending District Court cases as Verizon's Motion seeks.

B. Verizon's Motion is Inappropriate, Unnecessary, and Futile

Second, even if, *arguendo,* the likelihood that the Court will issue a ruling aligned with the Magistrate's F&R is high, what Verizon is really asking the Department to do at this time (speculatively at best, as any Department action would be based now on literally guessing what the Court might say) is to review or clarify its review of the agreements at issue, in response to what Verizon guesses the Court may rule.

Any such Department action to that effect would also remain properly before the Court in the pending case, to which the Department is already a party with ample opportunity to make any arguments on matters appropriately before the Court. Ergo, a request to re-open these dockets without a court or authority of competent jurisdiction having issued a ruling so requiring is nothing more than a futile attempt at some sort of last minute end-around bite at the apple, for Verizon and possibly the Department. Even if Verizon's Motion in effect presumes a rubber-stamp by the Court of the Magistrate's F&R, the Magistrate has gone farther than recommending the Department clarify its review of the agreements. The Magistrate has properly within the Court's jurisdiction and authority begun an

independent inquiry into the merits of the contract determinations, an inquiry which may rightly be pursued – surely by one or more of the parties, depending on the outcome – by the Court, regardless of what the Department may do in the meantime.

C. Verizon Misconstrues the Extent to Which, and Manner in Which, the Department Has Considered the Agreements Themselves

In the final analysis, to the extent the Department or Verizon may now find it proper to rest this case on an examination or reexamination of the contracts themselves, the DTE has already ruled on the Agreements once, in the original 97-116. Subsequent departures by the Department from that ruling were based on what the Department then perceived to be (a) federal law, and (b) the degree to which, and manner in which federal jurisdiction affected the Department's ability to make those determinations. Now, those determinations, for the time period before June 14, 2001 or the termination of existing Interconnection Agreements,[8] may be upheld. It is not necessary to reexamine the plain language of the Agreements. Now that the contract language itself can be determinative, the inquiry in 1998 can be sufficient. In that Order, the Department found that ISP-bound traffic was local, within the definition in the contracts, not as it may have been tied to fluctuating federal law.[9] Accordingly, should the DTE or Magistrate rule that the language of the Agreements must govern, that language has not changed, and 97-116 (1998) should go into effect to govern the time period until the FCC preempted the Department's authority over the traffic at issue. See also 97-116-C.

Lastly, even if Verizon's Motion and the Department, at this point, prematurely determine that

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8 FCC Remand Order, 16 FCC Rcd at 9189, p 82.

9 "Local Traffic is defined in the Agreement as "a call which is originated and terminated within a given LATA, … as defined in DPU Tariff 10, Section 5 … " D.P.U. 97-62, Agreement, §1.38 The plain language of the Agreement indicates that Bell Atlantic and MCI WorldCom agreed to compensate each other for the termination of all

the agreements at issue, for whatever reason, require further Department review, this cannot be accomplished, fairly or legally, solely in the context of "comments." Proper review or reconsideration (in the Department's view of post-*FCC Remand Order* "mediation" contemplated in 97-116-F, together with the Department's acknowledgement that the 97-116 docket aims to address Massachusetts interconnection agreements generally; *see, e.g., 97-116-C*) of the agreements at issue is a fact-finding exercise, as such requiring full adjudication before some appropriate tribunal applying *Massachusetts* contract law.[10]

Despite Verizon's energetic attempt to argue that such determinations as the Magistrate Judge contemplates have already been made in these dockets,[11] each reference in their laundry list is a series of equivocations. Take the Verizon excerpt: "The Department has never disputed [the] premise" that "the eligibility of [Internet]-bound traffic for reciprocal compensation is an issue controlled by the terms of the parties' interconnection agreement," for example. While this statement is true, the operation of

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local calls." D.T.E 97-116 (1998) at 10.

10 In fact, in DTE 97-116-C, the Department itself indicated that it would not prejudge "any formal renewal or prosecution of the dispute before us last October, where such a renewal might rest 'on **contractual principles** or other legal or equitable considerations,' as distinct from general policy arguments."

11 "*See, e.g.*, D.T.E. 97-116-D at 18 (explaining that it looked to whether "[Internet]-bound calls were 'local' *within the meaning of that term as used in interconnection agreements*") (emphasis added); D.T.E. 97-116-E at 13 (explaining that Internet-bound traffic "is not subject to reciprocal compensation *pursuant to the … interconnection agreements*" at issue here) (emphasis added); DTE Summ J. Br. at 35 (Docket Entry 44) ("The Department has never disputed [the] premise" that "the eligibility of [Internet]-bound traffic for reciprocal compensation is an issue controlled by the terms of the parties' interconnection agreement."); DTE Supp. Br. at 1 (Docket Entry 109) (DTE interpretations were "pursuant to the terms of the Interconnection Agreement[s]"); *see also Global NAPs Inc.'s Adoption of the Terms of the Interconnection Agreement Between Global NAPs, Inc. and Verizon Rhode Island Pursuant to the Bell Atlantic/GTE Merger Conditions*, DTE 02-21, at 14 (rel. June 24, 2002) ("As we have done in our D.T.E. 97-116 series of orders, we begin with the language of the interconnection agreement at issue."). " Verizon Motion at 3, FN 3. All of these excerpted statements were made during the time when the Department, and frankly the parties, presumed that a federal determination defining "local" (as including or not including ISP-bound or Internet-bound traffic) would be dispositive of this matter, regardless what the contracts intended. In making such a federal determination, if any currently exists under remand, the FCC eventually declined to impose it on Agreements in effect prior to its assumption of jurisdiction. Therefore, to the extent the Department repeatedly felt subsequently compelled to alter course, it needn't.

"controlled by" refers exclusively to whether *federal* law deemed ISP-bound calls as "local," as one (of several) means of determining whether *reciprocal compensation* for ISP-bound calls under federal law was *required by the Act*, by sole virtue of the use of the single word "local" in the agreements and the operation of Act section 251(b)(5). What is omitted is that fact that other means exist for determination of whether compensation is required, among them whether compensation was required by the interconnection agreements *as Massachusetts contracts, as intended by the parties*.[12] At the time, throughout these examinations by the Department, this federal law determination promised to be dispositive of the issues; neither the parties nor the Department have ever reached the issue of whether, if, for sake of argument, reciprocal compensation for ISP-bound traffic is not required by the use of the word "local" in the agreements, by operation of the Act, the contracts otherwise require compensation for these services. This would be an issue of fact and operation of Massachusetts law.

Currently at the FCC, even in its most recent order on point (notably again under remand from the Circuit Court), to the extent that it governs compensation going forward, purposely omits ruling upon the time period prior to June 14, 2001, still squarely within the jurisdiction of the Department, and any court competent to review the Department's actions. Appropriate and prudent as it may have been for the Department to eschew any further investigation pendent on federal law until federal was settled, two things will now require either the Department or a Court, applying Massachusetts law, to investigate the contractual arrangements themselves: the fact that the nature of FCC jurisdiction over these issues – regardless of how it eventually wielded – appears to start only as of June 14, 2001, well after the advent of this dispute; and, final action of such federal authorities, as a matter of federal law, will only go so far

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12 *See D.T.E. 97-116-C.*

as to either require or permit compensation for ISP-bound traffic: it will not preclude it.

CONCLUSION

For the foregoing reasons, RNK urges the Department to Deny or Dismiss Verizon's instant Motion. Allowing Verizon's Motion and further Comments will only serve to ultimately delay this matter, and if pursued, only at this juncture in Verizon's favor. In any case, if Comments, or a full Department adjudicatory proceeding ensues more appropriately, it would only be concurrent with Court's continued review.

For RNK,

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